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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 4

CASCADE NATURAL GAS CORPORATION, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

No. 5

PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 24

SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court denying the motions to intervene of appellants in Nos. 4 and 5 (R. 1133–1148) is reported at 37 F.R.D. 330.[1] The district court's final decree of divestiture is reported at 1965 CCH Trade Cases, ¶ 71,453. The opinions of this Court in the earlier phases of the litigation are reported at 369 U.S. 482 (*California* v. *Federal Power Commission*, holding that the Commission should not have approved the merger until the district court decided whether it violated Section 7 of the Clayton Act), and 376 U.S. 651 (*United States* v. *El Paso Natural Gas Co.*, holding that the district court had erred in finding no violation, and remanding for entry of a decree of divestiture).

JURISDICTION

The judgment of the district court denying the motion to intervene of appellants in Nos. 4 and 5 was entered on January 22, 1965 (R. 1125–1131). Notices of appeal were filed by appellant in No. 4 on February 19, 1965, and by appellant in No. 5 on March 15, 1965 (R. 1398, 1524). The judgment of the district court denying the motion to intervene of appellant in No. 24 was entered on June 29, 1965 (R. 2186), and appellant's notice of appeal was filed on July 23, 1965 (R. 2201). On January 17, 1966, this Court noted probable jurisdiction of the three appeals (R. 2207). 382 U.S. 970. Appellants invoke the jurisdiction of this Court under Section 2 of the Expediting Act, 15 U.S.C. 29.

[1] The district court rendered no opinion in denying the motion to intervene of appellant in No. 24. The order (R. 2186) is unreported.

RULE INVOLVED

Prior to July 1, 1966, Rule 24 of the Federal Rules of Civil Procedure provided in pertinent part as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. * * *

Effective July 1, 1966, Rule 24(a) was amended to provide as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to inter-

vene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

QUESTIONS PRESENTED

1. Whether the district court correctly denied appellants intervention of right in an antitrust relief proceeding for the purpose of urging (*a*) that the divestiture decree would not achieve the objective of the antitrust suit (Nos. 5 and 24), or (*b*) that the new company to be created by the decree would be incapable of adequately serving its customers (No. 4).

2. Whether the district court acted within its discretion in also denying appellants in Nos. 5 and 24 permissive intervention.

STATEMENT

These appeals present the question whether appellants were improperly denied intervention in the proceedings on relief following this Court's decision in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.

I. THIS COURT'S DECISION AND MANDATE

In 1957, the United States filed a complaint charging that the acquisition of Pacific Northwest Pipeline Company ("Pacific Northwest") by El Paso Natural Gas Company ("El Paso") was unlawful under Sec-

tion 7 of the Clayton Act, as amended, 15 U.S.C. 18. In April 1964, this Court, on the government's appeal, decided the issue of violation, holding that the merger was unlawful because it might substantially lessen competition in the sale of natural gas to customers in the State of California. *United States* v. *El Paso Natural Gas Co., supra.*

When it acquired Pacific Northwest, El Paso operated one of the nation's largest interstate natural gas pipelines, and the only one then serving California. It bought gas in the Permian Basin (southeastern New Mexico and western Texas), the Texas and Oklahoma Panhandle, and the San Juan Basin (New Mexico), and transported it to the Arizona-California border for sale. Pacific Northwest had been certificated in 1954 by the Federal Power Commission to serve a large and developing area extending from southwestern Colorado, through the Rocky Mountains, Oregon, and Washington, to the Canadian border. The pipeline was designed to use both San Juan Basin gas from the south, and Canadian gas from the north. 376 U.S. at 653.

Although Pacific Northwest had no customers in California and no pipeline immediately capable of serving that State, it had on a number of occasions demonstrated an intense interest in entering the California market. The Court ruled that this fact, together with Pacific Northwest's "formidable geographic position *vis-à-vis* California," made Pacific Northwest a significant competitor of El Paso in California at the time of the acquisition (376 U.S. at 661). The Court pointed out that competition in the natural gas

pipeline business is basically "for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas." 376 U.S. at 660. The California market was almost certain to develop such new increments of demand, and the Court concluded that an independent Pacific Northwest would have had significant opportunities to capture them. *Id.* at 661.

In reversing the district court, this Court, noting that El Paso had been "on notice of the antitrust charge from almost the beginning," directed the district court, on remand, "to order divestiture without delay." 376 U.S. at 662.

II. THE PROCEEDINGS ON REMAND

A. THE NEGOTIATIONS CONCERNING RELIEF

Shortly after this Court's decision in April 1964, the government and El Paso began to discuss possible methods of carrying out the mandate for prompt divestiture. Although these discussions were lengthy and detailed, they did not produce agreement (R. 834–836). In October 1964 the district court opened hearings on the relief issue, at which El Paso submitted and supported through testimony and exhibits a proposed divestiture plan (R. 1835–1875). The plan provided for the creation of a new corporation ("the New Company") to which El Paso would transfer all pipeline assets acquired from Pacific Northwest, together with some very substantial additions and improvements (R. 148). These assets would have had a net book value of $243 million (R. 1836). In exchange, El Paso would receive and distribute to

its shareholders all the stock of the New Company and the New Company would assume $180 million of El Paso's indebtedness (including pipeline mortgage bonds and debentures) at an interest rate ⅛ percent higher than that being paid by El Paso (R. 1836). All stock in the New Company distributed to El Paso's largest shareholders (defined as those owning more than one-half of one percent of El Paso's stock), its officers, and its directors would be placed in a voting trust and could be voted only on instructions of the Board of Directors of the New Company (R. 1885, 609).

The government objected to El Paso's "spin-off" plan, primarily because of doubts that the New Company would act independently of El Paso, and compete against it, if it were controlled by El Paso's shareholders—a danger that the voting trust proposal, in the government's view, did not correct (R. 743, 744, 750, 841, 1230, 1242, 1416–1423). The government advanced other objections to El Paso's plan. It suggested that if the New Company were to be an effective competitor in California, it would need additional gas reserves—in particular, some of the San Juan Basin reserves that El Paso had acquired after the merger (R. 1426–1433). The government also objected to two of the contracts that El Paso proposed to execute with the New Company—one concerning the cooperative gathering of gas in the San Juan Basin, and the other concerning disposition of certain volumes of gas that the New Company would receive from Canada—on the ground that they were less favorable to the New Company than the contracts

Pacific Northwest had before the merger (R. 1433–1436). The government also opposed El Paso's plan for disposing of the large number of shares of Westcoast Transmission Company (Pacific Northwest's Canadian supplier of gas) that Pacific Northwest had owned at the time of the acquisition; while favoring the sale, the government urged that the New Company, rather than El Paso, should receive the proceeds (R. 1437–1440). Finally, the government contended that El Paso should be required to compensate the New Company, in some way, for its use of tax-loss carryovers that Pacific Northwest had accrued prior to the merger (R. 1440–1441).

The government did not limit its role in the divestiture hearing to suggesting defects in El Paso's proposed plan. It repeatedly urged the district court to consider whether some fundamentally different solution—in particular, the sale of the Pacific Northwest assets to an existing third party—might better fulfill the mandate of this Court (*e.g.*, R. 1075–1076). At an early stage of the hearing, however, the government obtained the impression that the district court regarded the spin-off proposed by El Paso as satisfactory, at least in basic outline (R. 613–614, 1358–1359). The court indicated that the immediate efforts of all parties should be directed toward improving El Paso's proposal, and that the sale alternative would not be considered until the court was persuaded that there was no possibility of devising a satisfactory spin-off (R. 613–614, 818–822, 824, 831, 893–894, 1358–1359, 1362). The court also stated that it believed that the parties could negotiate a satisfactory decree (R. 706–708).

Although the government did not agree fully with the district court's approach, it recognized the broad discretion that the trial court enjoys in formulating equitable relief, and it was concerned that, if a decree was entered that it regarded as fundamentally inadequate, and an appeal became necessary, the opportunity to accomplish prompt divestiture would be lost. Moreover, even after entry of a decree by the district court divestiture could not take place until the Federal Power Commission certificated the New Company under Section 7 of the Natural Gas Act, 15 U.S.C. 717f (see pp. 11–12, *infra*). Delay would make it more difficult for El Paso's Pacific Northwest division to hold its employees together as an effective unit and would also mean that the gas distributors and major consumers in Pacific Northwest's service area could not be sure of the policies that their pipeline supplier would pursue three or five years hence.

For these reasons, the government resumed informal discussions with El Paso, prepared to accept a spin-off plan if it could be assured that the New Company would be strong and completely independent of El Paso. The settlement discussions ultimately resulted in agreement on a plan which, in the government's judgment, while not perfect did satisfy all essential requirements for a strong and independent New Company.

With respect to the principal problem—domination of the New Company by El Paso's shareholders—the government obtained El Paso's agreement to incor-

porate a so-called "Reading Provision," under which each recipient of New Company stock would be required to tender his El Paso shares in exchange, so that no one would be both a New Company and an El Paso shareholder (R. 2175; see R. 872–875). The government yielded on insisting that the additional San Juan reserves be given the New Company because it was persuaded that those reserves were not, in fact, necessary to make the New Company a vigorous competitor for the California natural gas market—this because the New Company would be able to obtain (particularly from Canadian sources) all the gas it might need. The other points of dispute were also compromised in a manner judged satisfactory by the government to assure the New Company's capability and incentive to compete in the California market.[2]

B. ENTRY OF THE STIPULATED DECREE

Public notice of the decree negotiated by the government and El Paso was given on May 24, 1965, and, in accordance with the regular procedures of the Department of Justice (28 C.F.R. § 50), the stipulation provided for a waiting period of thirty days prior to the parties' moving for entry of the decree by the court (R. 2024–2025). The regulatory commissions of California and Wyoming submitted statements in support of the decree (R. 2083–2085); the regulatory commission of Washington, and appellant Southern Cali-

[2] We discuss these disputed points at greater length in the Argument, *infra*, at pp. 42–57, in showing that the government's representation of the interests of the applicants for intervention in restoring competition to the California market was adequate in fact, as well as a matter of law.

fornia Edison, submitted statements objecting to portions of the decree (R. 2067–2077, 2040–2048). When El Paso moved for entry of the decree on June 24, 1966, the district court, in addition, invited any interested person to present its views orally, and the regulatory commission of Oregon was heard in opposition to the proposed decree (R. 2117–2130).

At the same hearing session, El Paso moved that Glenn Clark be approved as chairman of the board and chief executive officer of the New Company and the court heard evidence concerning his qualifications, including the likelihood of his remaining independent of El Paso's influence (R. 2101–2105, 2115). Mr. Clark also submitted to the court his recommendations of persons to fill the positions of president, vice president and chief financial officer, and directors of the New Company (R. 2105–2110).

On June 24, 1965, the court entered the stipulated decree of divestiture (R. 2172–2179) and an order approving the appointment of Mr. Clark and the other officers (R. 2179–2180). Since that time, the first steps have been taken toward implementing the divestiture decree. With the assistance of El Paso, Mr. Clark and his associates have had the New Company incorporated (under the name of "Northwest Pipeline Corporation") and qualified to do business in the States in which it will operate (R. 2186–2187). In addition, on July 23, 1965, the New Company filed with the Federal Power Commission an application for a certificate of public convenience and necessity to operate the properties to be divested under the district court's decree. *Pacific Northwest Pipeline*

Corporation, et al., FPC Docket No. G–13018. The Commission set the matter for hearing and authorized eighteen persons (including the appellants here) to intervene in the proceeding. The New Company and El Paso filed detailed testimony and exhibits in support of their applications, and the Commission's hearing examiner conducted a prehearing conference to identify and clarify the issues of the case. But on June 27, 1966, the Commission granted a motion of its staff to suspend all further proceedings until after this Court's decision of the present appeals.

C. THE INTERVENTION APPLICATIONS

1. The Applicants

In the prior stages of the litigation, culminating in this Court's decision on the merits, only one person had sought to intervene.[3] When the district court opened the hearing on remand, however, it was confronted with twenty such applications (R. 1133).

Appellant California, through special counsel,[4] claimed to represent the interests of the natural gas distributing companies and natural gas consumers in that State, where El Paso sells most of its gas (R. 183). California's purpose in intervening was to assure restoration of Pacific Northwest as an effective competitor in California in conformity with this Court's mandate (R. 185, 459). At the outset, California emphasized its intention to oppose the distri-

[3] On December 20, 1957, the district court had denied the motion to intervene of one J. W. Greenough.

[4] As noted below, pp. 14–15, the State public utilities commission takes an opposing view to that urged by the special counsel (see R. 561).

bution of New Company stock to El Paso shareholders (R. 564), but it later broadened its substantive position to encompass all of the objections that the government was making to El Paso's plans. Appellant Southern California Edison, a large industrial user of natural gas (bought from companies that buy from El Paso), later (see p. 15, n. 7, *infra*) sought intervention to assert the same interest in restoring competition to California, and it joined in California's contentions. It added that the govement had not adequately represented its interests in stipulating to a decree that, in Edison's opinion, would not effectively restore competition (R. 2078–2082).

The public utility commissions of Oregon and Washington, and appellant Cascade, alleged that local gas distributors in Oregon and Washington (of which Cascade is one) had been completely dependent on Pacific Northwest for their gas supply and would be similarly dependent on the New Company, and asserted an interest in assuring that the latter would be as financially strong and well supplied with gas reserves as Pacific Northwest had been (R. 471–473, 516–517, 346–349). They particularly objected to the following aspects of El Paso's initial divestiture proposal: the failure to allocate additional San Juan reserves to the New Company; the changes in the San Juan gathering contract and the Canadian exchange contract; the award of the proceeds from the sale of the Westcoast stock to El Paso rather than to the New Company; and the failure to take account of El Paso's use of Pacific Northwest tax-loss carryovers (R. 481–489, 521–529, 357–368).

A number of other applicants from the service area of Pacific Northwest and the New Company—including the regulatory commissions of Utah and Wyoming (R. 250, 337)[5] Intermountain Gas Company (R. 274–276), Northwest Natural Gas Company (R. 461–463), and Washington Natural Gas Company (R. 259–263)—sought to intervene to support El Paso's proposal. The regulatory commission of Idaho, seeking intervention, approved the principle of El Paso's proposal but expressed some reservations about details (R. 491–496). Mountain Fuel Supply Company (R. 282–287), Utah Gas Service Company (R. 233–237), and Washington Water Power Company (R. 48–52) all sought to intervene to assert their interests as customers of Pacific Northwest, but did not announce either support or opposition for El Paso's divestiture proposal.

Persons located in the area which El Paso would continue to serve also sought to intervene, asserting an interest in assuring that the portion of the merged company remaining to El Paso after divestiture would be adequate to meet its service obligations to them. Of this group, Southern California Gas Company and the Southern Counties Gas Company supported El Paso's proposal (R. 240–242), and the Public Utilities Commission of California supported the stipulated

[5] In addition to asserting their representation of the interests of gas distributing companies and consumers in their States, the commissions noted that the New Company will purchase gas from producers in those two States, and that these producers will thus have an interest in assuring the New Company's financial strength and potential for growth (R. 251–252, 338–339).

decree (R. 247–249, 2084–2085),[6] while Pacific Gas and Electric Company wished to assure that the district court's divestiture decree would not determine issues that, in its opinion, were properly within the province of the Federal Power Commission (R. 571–572).

Another category of applicants for intervention came from areas that would be served both by El Paso and by the New Company. These applicants included the Nevada regulatory commission (R. 445–447) and Southwest Gas Corporation (R. 333–336), neither of which announced a firm position with respect to the El Paso proposal.

Lastly, Paradox Production Corporation, while apparently not claiming intervention of right, sought leave to intervene. Paradox's asserted interest was that of a prospective purchaser of the assets to be divested. It claimed that a spin-off would not result in satisfactory divestiture from an antitrust standpoint and that it was the most eligible of those seeking to purchase the assets, and submitted a proposed plan of divestiture through sale (R. 464–469).

2. The district court's ruling on the motions to intervene

On December 8, 1964, the district court orally denied the applications to intervene (R. 795–796). The court subsequently issued a memorandum opinion (R. 1133–1148).[7] It held that no applicant would be bound by the decree within the meaning of Rule 24(a)(2), and that none was so situated as to be adversely af-

[6] This was, of course, contrary to the position taken by special counsel for the State of California.

[7] Southern California Edison had filed its application after the denial of the others, and its application was denied by the court in a separate order of June 28, 1965 (R. 2186).

fected by the distribution of property within the meaning of Rule 24(a)(3), since none had a legal interest in the assets to be transferred in establishing the New Company (R. 1136–1137). The court also refused to allow permissive intervention under Rule 24(b), on the ground that the purpose of the intervenors was not to raise a claim or defense having a question of law or fact in common with the main action, but to inject into the proceeding issues of regulatory convenience and necessity that could only delay adjudication of the issues between the parties; "[i]ntervention would make 'divestiture without delay' a practical impossibility"[8] (R. 1145–1146).

SUMMARY OF ARGUMENT

The district court denied appellants' motions to intervene in the relief proceeding following *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651. The State of California and Southern California Edison sought intervention to urge that the decree was inadequate to carry out the objectives of the antitrust action and the mandate of this Court. Cascade Natural Gas Corporation sought intervention to urge that the new company to be created by the decree would be unable to serve its customers. All three, we submit, were properly denied intervention.

At the time that the district court denied the motions to intervene, one ground for intervention of right was that the movant might be bound by the judgment and representation of his interest by exist-

[8] The district court afforded all applicants the opportunity to present orally or in writing any matter which they thought would assist the court (*e.g.*, R. 1126). Some took advantage of this opportunity (pp. 10–11, *supra*).

ing parties was inadequate (F.R. Civ. P. 24(a)(2)). None of the appellants meets this test, since no claim of theirs would be barred, under *res judicata* principles, by the decree here. This is completely dispositive of the applications of California and Edison, for they cannot make even a colorable claim to any legal or equitable interest in the property to be divested, and that is the kind of interest required by Rule 24(a)(3)—the only other conceivable basis for intervention of right in this case.

Sometime after the district court proceedings in this case were concluded, this Court amended Rule 24(a) to eliminate the requirement of a "binding" judgment in the *res judicata* sense. The amended rule was not intended to apply to completed proceedings in pending actions, but, even if it were, the motions of California and Edison were properly denied. The amended rule precludes intervention of right whenever the movant's interest is adequately represented by an existing party, and the interests of California and Edison in this case were adequately represented by the United States. "Adequacy" under Rule 24(a) does not signify—either in private or in government litigation—adequacy in fact. In private litigation, representation by an existing party of the interest of an applicant for intervention is irrebuttably presumed adequate unless (1) fair representation is vitiated by collusion of the parties or nonfeasance, or (2) the interests of the applicant and of the party representing his interest are different. To make the right of intervention turn on whether the applicant's interest was in fact adequately represented would make it impossible to decide such

claims in advance of final judgment, for it is only then that the quality of the representation can be evaluated. The result would be protracted and redundant proceedings in many cases. In addition, an evaluation of the effectiveness of a party's handling of his case is particularly unsuited for judicial determination; and for the judge to inject himself into such issues would improperly shift the major decisions on trial conduct from the litigants' shoulders to those of the trial court.

These considerations apply with even greater force to government—and especially government antitrust—litigation, where, accordingly, an even stricter rule limiting intervention based upon a claim of inadequate representation has evolved. As this Court observed in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689, "sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting * * * [an antitrust] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." Delay is a problem that has long plagued antitrust litigation, and that poses a serious threat to effective antitrust enforcement. The problem would be sorely aggravated if, after entry of a final decree, applicants could, by claiming that the decree was in fact inadequate to achieve the objective of the action, reopen the proceeding and obtain indefinite postponement of final relief. In addition, judicial review of the wisdom of the government's litigating strategy would constitute an intrusion upon an exec-

utive function: that of conducting and, in appropriate cases, compromising actions to enforce the laws of the United States. Congress, moreover, by providing a wholly separate and independent procedure by which private antitrust suitors can vindicate their claims where the government has also brought suit, has made quite clear its determination to vest exclusive control of government antitrust litigation in the government.

Tested by the standard indicated in *Sam Fox*—the standard, we stress, uniformly applied in the federal courts—the government's representation of the interests of California and Edison was clearly adequate, since there is no suggestion either of adverseness or divergence of ultimate objectives, or of bad faith or malfeasance on the part of the government. It is clear even under the somewhat less strict standard of private litigation that the government's representation was adequate. The government was not guilty of nonfeasance. It did not abandon the case but pressed for divestiture, in conformity with this Court's mandate. Finally, even if adequacy-in-fact were the test of appellants' right to intervene (though we emphatically believe that it is not), the decree entered below, as we show, meets that test too.

Cascade premises its claim of intervention of right not on any antitrust cause of action against El Paso, but rather upon an asserted interest in the New Company, to be created by the decree, which will assume El Paso's obligations to supply gas to Cascade. The Federal Rules of Civil Procedure, however, have never allowed intervention of right by all who might inci-

dentally be affected by the judgment or decree in a suit—customers, suppliers, employees, creditors and competitors of the parties. Otherwise, few lawsuits could be confined to manageable proportions, for the outcome of any but the most trivial suit is bound to have an impact beyond the immediate parties to it. Rule 24(a) has, thus, uniformly been interpreted to require a legally protected interest—if not a cause of action whose later assertion in an independent suit might be precluded or impeded (as in the case of California and Edison), then at least a property right that the judgment might impair, like the interest of a junior lienor in a foreclosure action brought by a senior lienor which could extinguish his claim.

The amended rule does not relax the requirement of a legally protected interest, although it does eliminate the requirement of the former subsection 3 that the interest be one in property actually subject to the control of the court. Since Cascade has no lien or other legally protected interest in any property involved in this litigation—but is merely a customer of El Paso—it could not intervene of right even if this were private litigation. In fact, this is a government antitrust suit; and the reasons of policy that justify a strict test of interest apply with much greater force. The impact of an antitrust divestiture decree is bound to be widespread. If Cascade's interest were deemed sufficient to entitle it to intervene, it would be nigh impossible to prevent extensive intervention in almost every government antitrust action. The result would be a substantial diminution in the effectiveness of antitrust enforcement. Consent judgments—an in-

dispensable tool of such enforcement in view of the limited resources and personnel of the Antitrust Division of the Department of Justice—would rarely be entered, since a successful intervenor, having the rights of a party, could block such a judgment and insist on a litigated proceeding. Government control of litigated proceedings would also be disrupted, contrary to congressional intent and to the manifest practical needs of effective antitrust enforcement.

Even if the Court decides that Cascade's interest is sufficient to support intervention of right, its claim must fail because, in the particular circumstances here, it is clear that Cascade's interest is in nowise compromised by the decree. Indeed, as to Cascade the decree below is not, in a practical sense, final at all. The decree is expressly subject to future proceedings before the Federal Power Commission to determine whether the New Company to be created by the decree should be granted a certificate of public convenience and necessity to serve the old customers of Pacific Northwest—like Cascade. Should the Commission find that the New Company lacks adequate reserves to honor its commitments to those customers, the decree can be amended appropriately.

The court below also denied appellant's claims for permissive intervention under Rule 24(b). Permissive intervention, of course, is a matter within the sound discretion of the district court, and the exercise of that discretion is rarely disturbed on appeal. Appellants have made no showing of an abuse of discretion. On the contrary, the disruptive consequences of

allowing intervention in the circumstances of this case, outlined above, clearly justify the district court's denial of permissive intervention.

If this Court agrees that the district court properly denied intervention, the appeals should—in accordance with the settled practice of the Court—be dismissed. If the Court disagrees, and holds that appellants were entitled to be admitted as parties in the relief proceedings, the case should be remanded to the district court for a hearing on the complicated and technical issues that appellants have raised in challenging the decree. Thus, in either event, we believe that it would not be appropriate for this Court to decide the merits of the decree now.

ARGUMENT

In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, this Court (reversing the judgment of the district court) held that El Paso's acquisition of Pacific Northwest Pipeline Company might substantially lessen competition in the sale of natural gas in the State of California, in violation of Section 7 of the Clayton Act. The Court remanded the case to the district court with instructions "to order divestiture without delay" (376 U.S. at 662). After prolonged negotiation, the United States and El Paso agreed upon the terms of divestiture and submitted a proposed decree to the district court. Motions to intervene in the remand proceedings were filed by—among many others (see Statement, *supra*, pp. 12–15)—the State of California, Southern California Edison Company (an electric utility, operating principally in California, which purchases natural gas for use as fuel), and Cascade Natural Gas Corporation (a retail

distributor of natural gas in the States of Washington and Oregon).

California and Edison sought intervention to urge that the proposed decree was inadequate to achieve the objective of the government antitrust suit—to pry the California gas market open to competition by restoring Pacific Northwest as a viable independent concern able and eager to compete with El Paso to supply the needs of that market. Cascade apparently sought intervention primarily to claim that the decree was inadequate in that the new company to be created by the decree would not, in Cascade's judgment, have sufficient reserves to fulfill Pacific Northwest's contractual obligations to supply gas to Cascade—obligations El Paso had assumed when it acquired Pacific Northwest.* All three motions were denied by the district court, which then entered, as the final judgment in the case, the decree that the United States and El Paso had negotiated. These appeals followed.

I. THE MERITS OF THE DECREE ARE NOT AN ISSUE HERE

At the outset, we set to one side any question going to the merits of the decree, its adequacy to achieve the objectives of the antitrust action against El Paso, or its compliance with this Court's mandate in *United States* v. *El Paso Natural Gas Co., supra.* While, to be sure, appellants purport to be appealing not only from the orders of the district court denying intervention but from the final judgment itself as

*However, in this Court, at least, Cascade primarily emphasizes the new company's alleged inability to supply the California market—a market in which Cascade would appear to have no economic interest.

well, any challenge to the merits of the decree is, we believe, premature. If appellants were properly denied intervention, they were not parties to the proceeding below and—since only a party can appeal (*e.g., Ex Parte Leaf Tobacco Board of Trade,* 222 U.S. 578)—the appeals must be dismissed. See *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683; *Sutphen Estates, Inc.* v. *United States,* 342 U.S. 19. It makes no difference that the proceeding below was one to implement the mandate of this Court. Only if the decree were brought up by a party would the Court "have plenary power to determine whether [its] judgment was scrupulously and fully carried out." *United States* v. *duPont & Co.,* 366 U.S. 316, 325. The decree must be brought to the Court's attention in a "proper way" (*Continental Ins. Co.* v. *United States,* 259 U.S. 156, 166)—by appeal of a party.

Should the Court decide, contrary to our submission, that appellants should have been allowed to intervene, the proper course would be to remand the case to the district court for a hearing on the adequacy of the decree. The decree was entered on the stipulation of the United States and El Paso. Accordingly, there was no adversary hearing on its terms, and no ruling or findings by the district judge with respect to the issues raised by appellants in challenging the decree in this Court. The issues on relief in this case are unusually complicated and technical. We know of no precedent for this Court's undertaking to appraise the adequacy of an antitrust decree of such

complexity without the benefit of the district court's views.

Thus, in our view the only issue to be decided here is whether appellants were properly denied intervention in the relief proceedings.

II. THE CLAIMS OF CALIFORNIA AND EDISON TO INTERVENTION OF RIGHT PLAINLY DO NOT MEET THE STANDARDS OF PRE-AMENDMENT RULE 24(a)—AND THOSE ARE THE STANDARDS APPLICABLE TO THEIR CLAIMS

A. CALIFORNIA AND EDISON DO NOT MEET THE REQUIREMENTS OF THE OLD RULE

Under Rule 24(a) of the Federal Rules of Civil Procedure as it stood when the district court ruled on appellants' motions to intervene, intervention of right lay when the movant might be bound by the judgment, and his representation by existing parties was inadequate (subsection 2);[10] or, when he might be adversely affected by the disposition of property in the custody or control of the court (subsection 3).[11] None of the appellants meets the first test. This Court has held that "bound" means bound strictly in the *res judicata* sense, and that the judgment in a government antitrust suit is not *res judicata* in a subsequent private antitrust action—even one based on the same facts. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683. That the prior decree might be accorded great

[10] It is not disputed that both conditions—inadequacy of representation *and* binding judgment—must be established for a claim to be made out under Rule 24(a)(2). *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688.

[11] No one claims that subsection 1—relating to intervention of right on the basis of a statute expressly conferring such right—is applicable here.

weight as a matter of comity is immaterial. *Id.* at 694.

California and Edison plainly fare no better under the other ground for intervention of right. To be sure, there is property in the court's control—the assets involved in the divestiture. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19. But it is well settled that to come within Rule 24(a)(3) the applicant must have a property right of some kind,[12] and neither California nor Edison can claim anything even remotely akin to legal or equitable title to, or a lien upon, any part of the assets of El Paso or Pacific Northwest. The interest they assert in this proceeding is an antitrust cause of action against El Paso. If such an interest supported a claim of intervention under subsection 3—where the applicant need show neither that he may be bound by the judgment nor that his representation by existing parties is inadequate—subsection 2 would be read out of the rule. The plain design of the rule is that subsection 2 shall govern claims of intervention based upon a right of action that might be extinguished if intervention were denied, and that

[12] *Dowdy* v. *Hawfield*, 189 F. 2d 637 (C.A. D.C.), certiorari denied, 342 U.S. 830; *Board of Commissioners of Sweetwater County* v. *Bernardin*, 74 F. 2d 809, 815–816 (C.A. 10), certiorari denied, 295 U.S. 731; *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20, 30 (C.A. 8); *Gross* v. *M. & A. Ry. Co.*, 74 F. Supp. 242, 249 (W.D. Ark.); *United States* v. *Columbia Gas & Elec. Corp.*, 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687; *Vaughan* v. *Dickinson*, 19 F.R.D. 323 (W.D. Mich.); *First State Bank* v. *Citizens State Bank*, 10 F.R.D. 424 (D. Neb.); 4 Moore, *Federal Practice* (2d ed.), § 24.09.

subsection 3 shall govern claims based upon a special interest in the *res* of the action. This essential distinction would be obliterated if California or Edison were allowed to intervene under Rule 24(a)(3).

B. AMENDED RULE 24(a) DOES NOT APPLY

On February 28, 1966, this Court amended Rule 24(a) to eliminate (among other things) the requirement of the former subsection 2 that the applicant show that he may be bound by the judgment. 384 U.S. 1031, 1051. Rule 24(a)(2) [13] now grants a right to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." We grant that the practical ability of California or Edison to protect the interest they assert in this litigation might be impaired by the decree entered below. In any Section 7 action they might bring against El Paso the district court would doubtless be reluctant to grant broader relief than that embodied in the final decree in this case. If, then, the amended rule is applicable here, the Court must decide whether the interests of California and Edison were adequately represented by the United States. But we think it inapplicable.

[13] Subsections 2 and 3 of the old rule have been fused to form a new subsection 2. Subsection 1 (intervention on the basis of a statute) remains unchanged. Rule 24(b) (permissive intervention) was not amended.

Proceedings in the district court were completed many months before the rule was amended or took effect. To be sure, the amended rule applies to "further proceedings in" pending actions.[14] But that means proceedings occurring *after* the rule was amended, albeit the underlying action may have been initiated before.[15] Here, the district court proceeding in which intervention was sought was completed long before the amendment. In addition, the amended rule is not applicable to pending actions where its application would produce "injustice", and we submit that it would be unjust to the public to delay still further the

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[14] In its order promulgating the rules amendments of February 8, 1966, this Court stated that they were to—

> take effect on July 1, 1966 and govern all proceedings and actions brought thereafter and also in all further proceedings in actions then pending except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies. [384 U.S. 1031.]

Congress not having acted within 90 days, the amendments took effect on the date (July 1, 1966) specified in the Court's order. See 28 U.S.C. 2072.

[15] *E.g.*, *Schlaefer* v. *Schlaefer*, 112 F. 2d 177 (C.A. D.C.). In *Klapprott* v. *United States*, 335 U.S. 601, some Justices expressed the view that an amendment to Rule 60(b) that took effect after the lower court proceedings was nonetheless applicable to petitioner's claim to reopen a default judgment denaturalizing him. The basis of this view was the extraordinary hardship worked by such a judgment. As Mr. Justice Frankfurter explained, "since citizenship is at stake and this is in effect an appeal in equity to be dealt with as of the time of adjudication, it seems more consonant with equitable considerations to judge the case on the basis of the Rule now in force, even though the lower court did not have the opportunity to apply it." 335 U.S. at 629 (dissenting opinion). Such considerations obviously would not apply here.

completion of this already greatly protracted litigation—the inevitable result should this Court find that under the standards of the amended rule appellants are entitled to the rights of parties in the district court.

III. EVEN IF THE AMENDED RULE APPLIES, THE CLAIMS OF CALIFORNIA AND EDISON WERE PROPERLY REJECTED SINCE THEIR INTERESTS WERE ADEQUATELY REPRESENTED BY THE UNITED STATES

A. THE GOVERNMENT'S REPRESENTATION IN AN ANTITRUST SUIT IS ADEQUATE, WITHIN THE MEANING OF RULE 24(A), IF THE INTERESTS OF THE GOVERNMENT AND THE APPLICANT ARE THE SAME AND THERE IS NO SHOWING OF BAD FAITH OR MALFEASANCE BY THE GOVERNMENT.

1. In ordinary private litigation governed by Rule 24(a), it is settled law that an applicant for intervention who contends that his interest is not adequately represented by an existing party must show either that the party's interest is adverse to his, or that the party's representation of their common interest is tainted by bad faith, collusion, nonfeasance, or other gross default. To show merely that the party has been guilty of serious tactical mistakes in the conduct of the litigation, or that he has been deficient in resourcefulness, vigor or imagination, or that he made an unwise settlement, has never been regarded as sufficient.[18]

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[18] *Allegheny Corp.* v. *Kirby*, 344 F. 2d 571 (C.A. 2), certiorari dismissed, 384 U.S. 28; *International Brotherhood of Teamsters* v. *Keystone Freight Lines, Inc.*, 123 F. 2d 326 (C.A. 10); 4 Moore, *Federal Practice* (2d ed.), ¶24.08, pp. 38-39; see *Klein* v. *Nu-Way Shoe Co.*, 136 F. 2d 986 (C.A. 2); *Pyle-National Co.* v. *Amos*, 172 F. 2d 425 (C.A. 7); *Winkleman* v. *General Motors Corp.*, 48 F. Supp. 490 (S.D.N.Y.); *Twentieth Century Fox Film Corp.* v. *Jenkins*, 7 F.R.D. 197 (S.D.N.Y.).

A different rule would be fraught with the gravest difficulties.

(*a*) To be workable, a rule defining the right to intervene should, so far as possible, be susceptible of application at the outset of trial. Otherwise, protracted and redundant proceedings will in many cases be unavoidable. The existence of an adverse interest can ordinarily be determined in advance of trial. Bad faith, collusion or nonfeasance cannot. But these occur infrequently, and, where they are present, the proceedings are so tainted that justice requires that they not be accorded finality. In contrast, to make adequacy-in-fact the test under Rule 24(a) would unwarrantedly conduce to delay and duplication of proceedings. Since the soundness of a party's trial strategy normally cannot be evaluated prior to the entry of judgment, the proceeding would have to be repeated whenever the applicant for intervention persuaded the judge that his interest had not been pressed with adequate zeal or skill by an existing party. This has rightly been regarded as an insufficient basis for visiting upon the parties to the action the delay, effort and expense entailed in a repetition of the proceedings.

(*b*) Second-guessing the adequacy of a party's conduct of his case has never been considered an appropriate judicial function. In an adversary system of justice, judgments on trial strategy and tactics—what arguments to make, whom to call as witnesses, what defenses or counterclaims to assert, on what terms to settle, whether to appeal—are for the party and his counsel, not the judge, to make. And not only are objective criteria suitable for ju-

dicial application lacking in regard to such questions, but, as this Court has stressed, a judge is in no position to protect a party's interests by attempting to perform counsel's function as well as his own. *Dennis* v. *United States*, 384 U.S. 855, 875.

(*c*) It would be unfair to the parties to wrest control of the litigation from them on the basis of the judge's inevitably subjective evaluation of their conduct of the case. The burden of litigation is the parties'; the risk of loss is theirs. Only in extraordinary cases, therefore, is it proper to take control of the litigation out of the hands of the parties. A judgment on how effectively they have protected their interests in the litigation has rightly been considered too flimsy and speculative a basis for so drastic an interference with the rights of the litigants.

2. These considerations have even greater weight in the context of government antitrust litigation.

(*a*) The problem of protracted litigation is perhaps more acute in antitrust than in any other field of public law. Antitrust cases tend by their very nature to be complex and unwieldly, and major government antitrust cases have typically dragged on for years in the courts before the entry of the final decree.[17] The present is a case in point; the complaint was issued nearly 10 years ago, in 1957.

Such delays—apparently endemic to antitrust litigation—are serious in their consequences. The re-

[17] The records of the Department of Justice show that the average lapse of time between complaint and final decree in a litigated government antitrust case in recent years has been more than five years.

sources of government and defendant alike are sorely strained, with the result that the government is frequently compelled to forego the institution of proceedings that it believes justified by legal and public interest considerations and defendants are sometimes discouraged by the sheer expense of prolonged antitrust litigation from contesting cases in which they believe they might ultimately prevail. The time that is required to establish a precedent in the antitrust field retards the development and effective enforcement of the law and impairs certainty and predictability, with adverse effects on planning by government and business alike. In our dynamic economy, moreover, conditions in an industry or market may change radically in the course of several years; an antitrust decree thus may lose much of its effectiveness by the time it is finally entered.

The burdens and delays of antitrust litigation—already great—would be seriously aggravated if the adequacy of the government's representation were determined by a judicial appraisal of how effectively the government had conducted its case. As noted earlier, the test normally cannot be applied in advance of final judgment, and when intervention is allowed at that stage the proceedings must begin anew. The present is, again, a case in point. Almost three years ago this Court directed the entry of a decree of divestiture "without delay" (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662). Yet, if appellants were improperly denied intervention, the relief proceeding in the court below must be reopened, and an adversary hearing held at which appellants will have the right to introduce evidence, to cross-examine

the witnesses of the government and of the defendant, and, if they are dissatisfied with the decree entered by the district court on the basis of the new hearing (a likely eventuality [18]), to appeal to this Court.[19] Moreover, only after such proceedings have been completed will the Federal Power Commission go forward with its proceeding to certificate the New Company. Thus, years must elapse before this litigation finally terminates.

Drastic as the consequences of allowing intervention would be in this case, in other cases they would be even graver. Here intervention was sought only in the relief phase of the litigation, and while—as the five-volume record in this Court attests—in a major antitrust case that phase alone may constitute a proceeding of formidable length and complexity, the logic of appellants' position would entitle them to intervene in the violation stage of the litigation as well, if they could persuade the judge that the government had failed to conduct that phase of its case effectively and thereby failed to lay a foundation for adequate relief.

Moreover, in many—indeed most—government antitrust cases, judgment is entered on the basis of the defendant's consent, without any trial. In view of the government's limited resources for antitrust enforcement, the consent judgment is an indispensable tool of antitrust enforcement. Indeed, 70 percent of the government's antitrust judgments are consent

[18] As noted in the Statement, *supra*, pp. 8–9, the district court intimated a favorable view of El Paso's basic proposal.

[19] The Department's records show that on the average, appeals in government antitrust cases extend the litigation by more than 15 months.

judgments. Since a consent judgment is the product of negotiation—and hence typically provides something less than the full relief the government would have insisted upon had the case gone to trial—under appellants' theory there would frequently be colorable basis for a contention that the government's representation had not been "adequate"; and if the court agreed that the government had not driven the best bargain it could have, or that it should have litigated rather than compromised, the applicant for intervention could block the consent judgment and force the matter to trial. Moreover, the incentives of defendants to negotiate consent settlements would be appreciably reduced. A principal attraction of such judgments to defendants is that, unlike judgments entered after trial, they cannot be used by private plaintiffs to establish a *prima facie* violation of the antitrust laws. See Section 5(a) of the Clayton Act, 15 U.S.C. 16(a).

The decree in this case is not technically a consent judgment; but it shares important characteristics with one. Frequently, after the issue of violation has been litigated and determined, the parties in a government antitrust proceeding will, as here, negotiate a decree, which is then entered by stipulation.[20] This cuts down the length of antitrust proceedings appre-

[20] To take but two recent examples: In *United States* v. *General Dynamics Corp.*, the opinion of the district court finding violation was entered on September 26, 1966. 258 F. Supp. 36 (S.D.N.Y.). A remedial decree was then negotiated by the parties, and entered by stipulation on December 1, 1966. In *United States* v. *Standard Oil Co.*, the opinion finding violation was entered on March 31, 1966 (253 F. Supp. 196 (D.N.J.)), and a stipulated decree was entered on May 24, 1966.

ciably. In 4 of the 22 antitrust cases that the United States litigated and won in the last five years, relief proceedings consumed more than a year; and the average relief proceeding lasted almost 7 months. Under appellants' theory, negotiated relief could in many cases be blocked and the matter forced to trial, with appeals after that if the intervenors were not satisfied with the decree entered by the district court.

(*b*) For the courts to oversee the adequacy of the government's conduct of its litigation enforcing the antitrust laws, as appellants in effect urge, would encroach on responsibilities that in our system of government are vested in the Executive, not the Judicial, Branch. Law enforcement is an executive responsibility. Its proper discharge is governed by prudential, budgetary, tactical and other considerations foreign to the judicial process. Courts are ill equipped to determine when the Attorney General should settle a case for less than the broadest possible relief; when he should forego an appeal; when he should proceed criminally rather than civilly; and a myriad of like judgments that bear upon the effectiveness of his conduct of antitrust litigation. These are policy decisions for the executive. In the present case, the government decided that, on balance, the injury to the public interest from further delay in the entry of a final decree, the burden on the government's limited litigating resources of additional proceedings, and the unlikelihood that the district court would enter a stronger decree than that the government was able to negotiate with the defendant, outweighed the desirability of

pressing for such a decree. It may, of course, be argued that the government appraised the competing considerations incorrectly. But, we submit, it has never been thought the proper office of the judiciary to review the wisdom of the Attorney General's decision to settle rather than to sue.

(*c*) Quite apart from a general presumption, based on the structure of our governmental system, against judicial intrusion in executive functions, we find support for our position in the design of the antitrust laws themselves. As this Court has many times pointed out, those laws establish separate paths for private and government antitrust enforcement,[21] manifesting a congressional purpose of securing to the government exclusive and undivided control of its antitrust litigation. "The United States * * * must alone speak for the public interest" in such litigation. *Buckeye Co.* v. *Hocking Valley Ry.*, 269 U.S. 42, 49; see *United States* v. *Paramount Pictures*, 334 U.S. 131, 177; *United States* v. *Borden Co.*, 347 U.S. 514. To be sure, private persons have standing to

[21] Thus, only the Attorney General may bring a criminal antitrust action; only he may issue Civil Investigative Demands (15 U.S.C. 1311–1314); only governmental actions toll the statute of limitation; only decrees in governmental suits are *prima facie* evidence in other suits (15 U.S.C. 16); only the Attorney General may ask the district court to summon additional parties and witnesses wherever they reside (15 U.S.C. 5, 23, 25); and only in government suits may the parties appeal directly to this Court (15 U.S.C. 29). In short, "the scheme of the statute is sharply to distinguish between Government suits * * * and private suits * * *. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *United States* v. *Bendix Home Apliances*, 10 F.R.D. 73, 77 (S.D.N.Y.).

enforce the antitrust laws, but they have their own system of remedies and procedures,[22] precisely so that private antitrust enforcement can proceed without impeding the government's antitrust program. The congressional purposes would be thwarted if private antitrust suitors had standing to challenge the government's handling of its cases and to usurp its function if they convinced the judge that they could do a more effective job. As Judge Rifkind stated in *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76–77:

> It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure of the antitrust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the antitrust laws, or for the enforcement of decrees rendered under those laws.
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> The very fact that the Congress has made an adjudication in a Government suit prima facie evidence of certain facts in a private suit would indicate that it was not the intention of the Congress that private parties should be permitted to apply for private relief at the foot of a decree entered in a Government suit. 15 U.S.C. § 16. * * * Intervention, if allowed here, would tend to defeat the policy behind

[22] See Clayton Act, § 4, 15 U.S.C. 15 (treble damages); § 16, 15 U.S.C. 26 (injunction).

the distinction drawn by section 16 between litigated decrees and consent decrees.[22]

3. While Rule 24(a) does not in terms distinguish between government and private litigation, the courts have been mindful of the additional considerations, reviewed above, that must be weighed in the balance when intervention in a government antitrust suit is sought. They have accordingly applied an even stricter test regarding adequacy of representation than in private federal-court litigation. When this Court noted in *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689, that "sound policy would strongly lead us to decline appellant's invitation to assess the wisdom of the Government's judgment in negotiating and accepting * * * [an antitrust] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting," it was merely stating the rule that has uniformly been applied by the federal courts

[22] See, also, *United States* v. *ASCAP*, 341 F. 2d 1003, 1008 (C.A. 2); *United States* v. *ASCAP*, 11 F.R.D. 511, 513 (S.D.N.Y.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo.). In *United States* v. *Northern Securities Co.*, 128 Fed. 808, 812 (S.D. Minn.), the court observed:

> It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as amici curiae, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise.

in cases of this character,[24] as indeed in government

[24] See *Bardy* v. *United States*, 371 U.S. 576 (*per curiam*); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (*per curiam*), dismissing appeal from 186 F. Supp. 776 (E.D. Pa.); *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40 (*per curiam*); *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Ball* v. *United States*, 338 U.S. 802 (*per curiam*); *Partmar Corp.* v. *United States*, 338 U.S. 801 (*per curiam*); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Ex Parte Leaf Tobacco Board of Trade*, 222 U.S. 578; *United States* v. *Loew's, Inc.*, 136 F. Supp. 13 (S.D.N.Y.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N.J.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo.); *United States* v. *DuPont & Co.*, 13 F.R.D. 487 (N.D. Ill.); *United States* v. *American Society of Composers, Authors & Publishers*, 11 F.R.D. 511 (S.D.N.Y.); *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73 (S.D.N.Y.); *United States* v. *Columbia Gas & Elec. Corp.*, 27 F. Supp. 116 (D. Del.), certiorari denied, 309 U.S. 687; *United States* v. *Radio Corp. of America*, 3 F. Supp 23 (D. Del.); *United States* v. *Northern Securities Co.*, 128 Fed. 808 (S.D. Minn.). The two cases that appear to offer some support for appellants' position are readily distinguishable. In *United States* v. *St. Louis Terminal R. R. Assn.*, 236 U.S. 194, 199, this Court allowed intervention *in the Supreme Court*. Intervention at that level presents quite different issues than intervention below, for the possibility that intervention will mean delay is significantly diminished. Also, there (as in *United States* v. *Reading Co.*, 273 Fed. 848 (E.D. Pa.), modified and affirmed *sub nom. Continental Insurance Co.* v. *United States*, 259 U.S. 156), at issue was the right to intervene as a *defendant*, the intervenor's interest being the same as that of the original defendant. *California Co-op Canneries* v. *United States*, 299 Fed. 908, 912–913 (C.A.D.C.), to the extent it involved intervention as of right rather than as a matter of discretion, rests on the court of appeals' conclusion that Rule 15 of the Supreme Court of the District of Columbia gave a right of intervention "broader" than that provided by the federal equity rule then governing intervention to "any one claim-

litigation generally.[25] Thus, assuming that the interests of the government and of the applicant coincide, affirmative wrongdoing must be shown.

B. UNDER ANY STANDARD, THE GOVERNMENT'S REPRESENTATION HERE WAS ADEQUATE

1. The State of California and Southern California Edison sought intervention here to assert an interest identical to that of the United States—the interest in abating El Paso's Section 7 violation by restoring

ing an interest in the litigation" (299 Fed. at 912). See *United States* v. *California Canneries*, 279 U.S. 553, 556–557 (suggesting that the court of appeals' determination may have been in error). We do not regard *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, as an exception to the general rule that intervention in an antitrust case over the objection of the United States will not be allowed. In that case intervention was allowed because the decree itself specifically provided for intervention by the company (Panhandle Eastern Pipeline Co.) in whose behalf the intervention was sought.

[25] The courts have been most reluctant to allow private parties or even other governmental bodies to intervene in a suit to assert a public interest that was already being asserted by a governmental body that was a party to the suit. Thus in *New York City* v. *New York Telephone Co.*, 261 U.S. 312, the Supreme Court upheld the lower court's holding that New York City could not intervene in a suit of a telephone company against the Public Utilities Commission to require a rate increase. New York City wished to intervene to oppose the increase, but the court held that the Public Utilities Commission adequately represents the interest of New York consumers. In *Reich* v. *Webb*, 336 F. 2d 153 (C.A. 9), private parties were denied permission to intervene on the ground that the Federal Home Loan Bank Board would adequately represent the public interest. See, also, *O'Connell* v. *Pacific Gas & Electric Co.*, 19 F. 2d 460 (C.A. 9); *Gross* v. *Missouri & A. Ry.*, 74 F. Supp. 242 (W.D. Ark.).

Pacific Northwest as an effective competitor in the California natural gas market. No adverseness or difference of interests is shown or suggested. Compare *Kaufman* v. *Societé Internationale*, 343 U.S. 156. Thus, under the standard consistently applied in government antitrust litigation by the federal courts—and remarked approvingly by this Court in *Sam Fox*—the only question is whether the government acted in bad faith or out of malfeasance in negotiating the decree entered below. And nothing of that sort is alleged.

Even if the standard of private litigation—which permits the presumption of adequate representation to be rebutted by establishing nonfeasance—were applicable here, the claims of California and Edison to intervene of right were properly rejected. Nonfeasance connotes inaction. It might be shown if, for example, the government, after this Court's remand with instructions to the district court to order divestiture without delay, had agreed uncritically to a token divestiture proposed by El Paso. There was no such abdication. The government entered upon prolonged negotiations with El Paso, eventuating in a decree of divestiture that, in the government's view, complied with the Court's mandate. Compare *Wolper* v. *Poretsky*, 144 F. 2d 505 (C.A. D.C.), certiorari denied, 323 U.S. 777.

Finally, even if the standard were as appellants contend—the adequacy in fact of the government's representation of their interest—we would urge that it was met here. The settlement was a reasonable one. To be sure, the government receded on some points, but that is the essence of any settlement. As next we show,

the stipulated decree is well designed to restore Pacific Northwest as an independent and effective competitor in the California market.

2. This Court held that Pacific Northwest was an important competitor in the California market because it strongly desired and had attempted to sell gas in California and had tangible strategic advantages flowing from the location of its pipeline and its gas reserves. 376 U.S. at 661. The decree provides the New Company with the same economic incentive to enter and an equivalent—or increased—ability to do so. The New Company is to be given all of the physical assets Pacific Northwest owned, together with some substanital improvements (R. 147–148). In one important respect—financial strength—the New Company will be in a better position than Pacific Northwest to undertake competitive assaults upon new markets. At the time of the merger, Pacific Northwest was still in its "developmental" phase, and there was considerable uncertainty whether its markets—all entirely new to natural gas service—would develop as favorably as had been initially projected. Under El Paso's management, the developmental stage has been successfully passed (R. 174–175) and the New Company will have a firm base in the Pacific Northwest area upon which to support a project for expansion into California (R. 171–172). Moreover, the New Company will benefit from a sound capital structure. Although it will have a high percentage of long-term debt—as did Pacific Northwest—it will have the advantage of

a far lower debt cost than any pipeline starting up today could expect.[26]

To be sure, the decree admittedly represents a compromise between the views originally taken by El Paso and those taken by the government on the appropriate relief. But, we submit, it is in all respects a reasonable settlement that fully accomplishes the essential objectives of the antitrust proceeding. This emerges from a brief review of the points of dispute between the parties, and how they were settled.

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[26] El Paso has elicited agreement from its bondholders to accept the New Company as substitute obligor on a portion of the present bonds at average interest rates of 4.89 percent for the first-mortgage bonds and 4.99 percent for the debentures; this is far lower than the rate prevailing in the present money market (R. 146–147).

Cascade and Edison contend that the debt-equity ratio of the New Company will be too high to permit it to engage in any major new financing. It is undoubtedly true that the New Company will have a larger percentage of debt than the average major interstate pipeline company and that—as an official of Colorado Interstate Gas Company (one of the interested prospective purchasers of Pacific Northwest) testified (R. 1199)—all other things being equal a company with a lower debt-equity ratio would experience less difficulty in obtaining new financing on favorable terms. However, several countervailing considerations must be noted. First, Pacific Northwest itself had approximately the same debt-equity ratio, but its chief executive officer had expressed confidence that, given the state of the market in California and an adequate gas supply, he could easily finance an expansion of the pipeline to California (R. 1381–1382). Moreover, the knowledgeable and experienced institutional investors who will be the holders of the New Company's bonds (R. 143–144) have indicated their considerable confidence in the financial soundness of the New Company's capital structure by accepting a transfer of all obligations from El Paso to the New Company with only a one-eighth of one percent increase in interest rates.

(*a*) El Paso initially proposed that the New Company's common stock be distributed to the present common shareholders of El Paso (R. 1837–1838). Although the normal turnover in ownership of El Paso stock is substantial (R. 1363) and although El Paso would have imposed a voting trust upon the New Company stock distributed to the largest El Paso shareholders and the El Paso directors (R. 1261), the government opposed this spin-off for fear that there would be an appreciable overlapping between the shareholders of El Paso and the shareholders of the New Company (*e.g.*, R. 1416–1425). Ultimately El Paso yielded to the government's objection by incorporating a Reading-type provision (decreed by this Court in *Continental Insurance Co.* v. *United States*, 259 U.S. 156), which provides, in essence, that no one may be both an El Paso and a New Company shareholder.[27] Save in three very minor re-

[27] El Paso will first attempt to distribute the New Company shares of those of its shareholders who are willing to tender all of their El Paso shares in exchange. If 80 percent or more of the New Company shares cannot be distributed in this way, El Paso will then sell them through a public offering from which holders of more than ½ of 1 percent of El Paso's common will be barred (R. 2175–2176). Since El Paso will realize a substantial income tax saving if the distribution of New Company shares can be accomplished by exchange, it has a strong incentive to accomplish the distribution within the eighteen months which the order allows for that purpose. But if the distribution cannot be accomplished by exchange, the order protects the independence of the New Company until its shares can be sold: all undistributed shares of New Company will be placed in a voting trust and the chief executive officer of New Company, as trustee, will have absolute freedom to vote the shares in the manner best calculated to

spects,[28] the New Company will not be influenced by

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advance the interests of the New Company (R. 2176-2177, 2110).

Only Edison raises any question about the adequacy of the decree to assure the complete independence of the New Company from El Paso, and Edison's criticisms are not well founded. Contrary to Edison's contention (Br. 33), the alternative of sale of the shares if their distribution cannot be accomplished through spin-off does not present any significant risk that El Paso may maintain control of the New Company. In addition to the provision of the decree prohibiting any officer or director of El Paso or any owner of more than one-half percent of its stock from purchasing New Company shares in the public offering (R. 2176), there is a further provision of the decree (paragraph VI (B), R. 2177) which prohibits El Paso from having as an officer or director any person who owns any capital stock of the New Company or a member of whose immediate family owns more than one-tenth of one percent of the stock of the New Company. Thus, there is no danger that the officers and directors of El Paso may covertly obtain control of the New Company. Edison suggests that there is a danger that major shareholders of El Paso may, subsequent to the public offerings, purchase large blocks of New Company stock and obtain effective control. That danger, however, is no greater here than in any case in which unlawfully acquired assets are divested to a publicly held company. And the short answer is that if such an unlikely event were to occur, the government, pursuant to paragraph VIII of the decree (R. 2178-2179), would move for additional relief to accomplish the clear purpose and intent of the divestiture decree.

[28] First, New Company will be required to join with El Paso in filing consolidated income tax returns as long as they continue to be eligible to do so. The New Company will suffer no financial disadvantages because of this arrangement. Second, the New Company will be required to pay out at least 75 percent of its net earnings as common stock dividends. Finally, El Paso retains the right to determine, consistently with the Articles of Incorporation and By-Laws of New Company, the number and the technical terms and conditions of the common shares to be issued (R. 2110-2111).

El Paso's interests or wishes. Certainly the court-approved executive officers of the New Company will be independent. The Chairman of the Board and chief executive officer, Glenn W. Clark, a highly qualified executive,[29] although initially approached by El Paso (R. 2104), understood fully from the outset that the district court would make the appointment; that the approval of the government would be an important factor in its decision; and that the government would be especially concerned to have convincing evidence of the nominee's complete independence from El Paso (R. 2115). The government is convinced that Mr. Clark is completely independent. He has never had any association with El Paso (R. 2102); he has assured the court that he is able to assume the office—understanding the importance of a free and uncontrolled management—without any kind of reservation (R. 2103–2104); and he has selected as president and as chief financial officer of the New Company two persons with similar backgrounds of long experience in the natural gas business and of independence from El Paso (R. 2105–2107).[30]

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[29] He has been in the gas transmission business for more than thirty years, and has served successively as president of Cities Service Gas Company and Mississippi River Fuel Corporation, two of the nation's major interstate pipeline companies (R. 2101–2102).

[30] Mr. Clark selected Charles Klein to be president of the New Company; Mr. Klein was formerly a vice-president and director of Cities Service Gas Company (R. 2105–2106). As vice-president and chief financial officer of the New Company, Mr. Clark selected L. V. Tracht, who has served United Gas Company and Mississippi River Transmission Company in similar capacities (R. 2106).

(*b*) California (Br. 17–18) and Edison (Br. 31–33) complain about the length of time it may take for El Paso to complete the spin-off of the New Company. The government originally urged the district court to consider the alternative of a sale to a third party on the ground it would be more expeditious. But, in view of the steps which have been already taken to implement the spin-off pursuant to the district court decree, it hardly seems that a sale to a third party would today constitute a more expeditious method of divestiture than carrying out the decree. It would require substantial time to advertise for prospective purchasers, investigate and appraise the qualifications of interested applicants, and complete the complicated mechanics of the sale transaction; and there could be no application to the Federal Power Commission for operating authority until the purchaser was selected and the terms of sale fully settled.

(*c*) The government objected that El Paso's original proposal did not give the New Company an adequate share of the San Juan gas reserves. Although El Paso was willing to give the New Company all the reserves that Pacific Northwest possessed before the merger, the government originally argued that El Paso should also give the New Company some of the San Juan Basin reserves which it had acquired in the years after the merger, to reflect what Pacific Northwest would probably have acquired had it remained independent (R. 1426–1433). El Paso pointed out, however, that at the time of the merger Pacific Northwest had just acquired a large Canadian supply of gas, and therefore had much

more gas available than it could use; that the San Juan Basin proved so costly to develop that Pacific Northwest sharply curtailed its rate of development there; and that in the meantime independent producers were continuing to develop gas fields in the Rocky Mountains—an area in which the producers were completely dependent on Pacific Northwest for access to markets and in which Pacific Northwest therefore felt an obligation to buy the available gas. Thus it was argued that, while an independent Pacific Northwest probably would not have acquired new supplies of San Juan gas in the late 1950's and early 1960's, El Paso would almost certainly have continued to do (R. 987-988, 1300-1303).

El Paso's arguments cast doubt on whether any of its additions to the San Juan reserves subsequent to the merger would have been Pacific Northwest's but for the merger. More importantly, the government became convinced that, while giving the New Company additional San Juan reserves might be desirable, it was not necessary, in order to make the New Company an effective competitor in the California market. It seems extremely unlikely that the New Company will not be able to acquire sufficient gas to expand into California. The New Company will again be in the dominant position to secure reserves as they are developed in the Rocky Mountain area (R. 152, 628). It will receive the benefit of contracts between El Paso and Canadian suppliers (see pp. 51-52, *infra*). And it will be in an excellent position to secure additional supplies of Canadian

gas, as they become available." This is especially significant since, if the New Company enters the California market, it will probably enter from the north, using Canadian gas, rather than from the south, using San Juan gas. All of Pacific Northwest's proposed projects for serving California provided for this type of entry from the north (see 376 U.S. at 654–655), and northern entry seems clearly the more probable." Nor is it at all clear that San Juan gas would be cheaper for a California project (see R. 725).

We stress that the pertinent consideration is not whether the New Company at the outset of its operations will have the gas necessary for a California project, but whether it will be able to obtain the gas when the need arises. It would be an unusual case in which a pipeline firmly committed itself to substantial gas purchases before knowing whether (1) the intended resale customer would accept its proposal and (2) the Federal Power Commission would grant the necessary certificate authority for the sale. In this

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"This fact is evidenced by the recent agreement between El Paso and Westcoast Transmission Company for the importation of an additional 200,000 Mcf per day of Canadian gas to serve markets in Washington, Oregon and Idaho. Under the terms of the decree, this additional gas supply would pass to the New Company. El Paso's application to the Federal Power Commission for the necessary authorization for this importation is now pending. F.P.C. Docket No. CP 66-[illegible].

"Cascade informed the district court that (R. 336):

> the best and most likely prospect that California consumers of gas might look forward to, insofar as prospective competition in that area from New Company is concerned, will be afforded through extension of New Company's Pacific Northwest transmission facilities and the utilization therein of additional supplies of Canadian gas obtained through the Sumas station.

case, as noted, all indications are that sufficient gas supplies will be available to the New Company when it comes time for it to put together a California project."

(*d*) Before the merger, both El Paso and Pacific Northwest owned gas reserves in the San Juan Basin. Pacific Northwest's reserves were mainly located in the eastern end of the Basin, El Paso's (larger) reserves mainly in the western end. Long before the merger the two companies, in order to avoid the expense of unnecessary duplication, agreed that they would develop gathering lines in the Basin cooperatively, and that whichever company had made greater use of the other's gathering lines would pay periodically a gathering charge of 1.375¢ per Mcf of extra gas (R. 158–159; see 376 U.S. at 653). El Paso did much more gathering for Pacific Northwest than Pacific Northwest did for El Paso.

El Paso originally proposed to increase the gathering charge from 1.375¢ to 4.5¢ on the ground that it needed at least 4.5¢ to cover its expenses (R. 159). The government opposed El Paso's proposal because it believed that El Paso should not be able to change the contract unilaterally, and that the district court should not intrude upon the Federal Power Commission's authority to decide whether an increase in the gathering charge was justified (R. 1436). The stipulated decree basically gives the government what it wanted, since the decree is expressly without preju-

[33] The Pinedale reserves to which the State of Oregon refers (Br. 19–20) were owned by El Paso long before its acquisition of Pacific Northwest stock. No one has heretofore suggested that they be given to the New Company and, in any event, they are conceded to be of scant commercial value (R. 672–673).

dice to the Federal Power Commission's considering the proposed increase when it passes upon the New Company's application for certification and El Paso's application for authority to abandon service (paragraph IV (B), R. 2174–2175).[34] At that time the Commission could impose an "initial price" condition in the certificate that would in effect require El Paso to seek approval of the increased rate in a proceeding under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), in which it would have the burden of proof. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 278.

(*e*) Sometime before El Paso's acquisition of Pacific Northwest, Westcoast Transmission Company, a Canadian company, offered to make available to Pacific Northwest a new supply of gas from fields in Western Alberta. After El Paso acquired control of Pacific Northwest, an agreement was concluded under which Westcoast would deliver (at Kingsgate) to El Paso's Pacific Northwest unit a minimum of 135,000 Mcf per day (R. 160–161, 622–623). This volume of gas was far in excess of any conceivable requirement of Pacific Northwest's markets at that time or for a number of years to come; and it was understood at the outset that most of this gas would be used to supplement El Paso's gas supplies in the south (R. 625).

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[34] In view of the Commission's conditioning power, the decree gives El Paso no greater right than it had under its original contract with Pacific Northwest. That contract authorized each party unilaterally to file a proposed increase in the gathering charge with the Federal Power Commission, which would determine the reasonableness of the change (R. 158). Cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103.

The growth in the markets of the Pacific Northwest that the Commission envisioned in 1960, in granting El Paso temporary permission to use elsewhere in its system that portion of the Kingsgate supply that was not needed in Pacific Northwest markets (*Pacific Gas Transmission Co.*, 24 F.P.C. 134, 139–140), has now in substantial measure been realized (R. 174–175, 626–627). In the division of gas reserve between El Paso and the New Company, the Kingsgate supply has been given to the New Company, and it is obviously an extremely valuable addition to the reserves which Pacific Northwest had at the time of the merger. There is, however, some question whether the New Company's markets have yet developed to the point where it can dispose of the entire Kingsgate supply in the off-peak periods (R. 160). The stipulated decree thus provides that for a five-year period the New Company can get some help from El Paso in disposing of that gas. Entirely at its option, the New Company will have the right to deliver certain quantities of gas to El Paso during the slack summer period, and El Paso will pay whatever price the New Company is obliged to pay Westcoast currently (R. 1851–1852). Moreover, the New Company will have the further option to buy back from El Paso during the peak winter period an amount of gas equal to that sold to El Paso under the summer option (at 18.5¢ per Mcf) (R. 1851–1852).

Originally, the government opposed the inclusion of these particular option provisions in the decree on the ground that they were less favorable to the New Company than the prior contract had been to Pacific

Northwest (R. 1434–1436). Under the original contract, Pacific Northwest could require El Paso to take an unlimited amount of Kingsgate gas (R. 1758). The new contract limited the amount that the New Company could force El Paso to take (R. 1851–1852). The government withdrew its opposition, however. It seemed unreasonable to give the New Company the right to force El Paso to take up to 134,000 Mcf per day, when El Paso had no right to insist on the sale to it of any of the gas. Moreover, contrary to the government's initial understanding, the original contract had not been the product of arms-length bargaining between two independent companies (see R. 999–1001). It was written at a time when Pacific Northwest was almost a wholly-owned subsidiary of El Paso, and El Paso, through its control of Pacific Northwest, could prevent Pacific Northwest from deluging it with unwanted gas. Finally, the government decided that consideration of the objections to the option provisions could best be left to the expert judgment of the Federal Power Commission in the certification proceeding (see R. 1028–1029).[35]

[35] Some of the customers of El Paso's southern system may contend before the Commission that the option provisions place an undue burden upon them, especially in view of the disparity between the price which El Paso will pay under the first option and the price which it will receive under the second option. On the other hand, customers in the Pacific Northwest area may contend that even larger option provisions are necessary in order to assure them economically sound and efficient gas service. If the Commission should conclude that some modifications of the option provisions are necessary for the protection of one group or the other, it may impose appropriate conditions

(*f*) When it was acquired by El Paso, Pacific Northwest owned approximately 25 percent of the common stock of Westcoast Transmission Company, its pipeline supplier of gas at the Canadian border (R. 628). The stipulated decree provides that within one year of its entry, El Paso shall sell all its Westcoast stock holdings to persons approved by the district court (R. 2176). Since ownership of a major Canadian supplier by a domestic pipeline could injure competition, the government agreed that the shares should be sold. But it argued that since most of the shares had originally belonged to Pacific Northwest, they should be transferred to the New Company so that it could enjoy the benefit of the proceeds (R. 1437–1440). El Paso contended, however, that the New Company would receive under the decree more than $100 million worth of improvements that had been made to Pacific Northwest's system, and that El Paso should not also be required to make a cash contribution to the New Company of $16–20 million (R. 1340–1341).

In accepting the stipulated decree the government acquiesced in El Paso's retaining the proceeds. It agreed that the shares—which had to be sold in any event [36]—were equivalent to cash and that the New

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to its grant of certificate authority, which would then be reviewed by the district court for consistency with the antitrust remedy.

[36] Appellants Cascade (Br. 29) and Edison (Br. 28) suggest that the New Company should be allowed to retain the shares to give it leverage in securing additional Canadian gas supplies. We believe, however, that the New Company should not be in any such position to foreclose other pipeline companies from access to a most important source of supply—Westcoast.

Company would not be weakened significantly if it failed to receive a cash contribution. El Paso demonstrated to the government's satisfaction that natural gas pipeline companies encounter little or no difficulty in securing short-term bank loans for working capital at the outset of their operations, and that soon internally generated funds will be available for this purpose.[37]

(*g*) From the outset of its operations until the acquisition of its stock by El Paso, Pacific Northwest showed large losses in its tax returns. Even larger tax losses were experienced during the period between El Paso's acquisition of control and the merger (R. 687). After the merger the right to make use of the valuable tax-loss carryovers passed to El Paso, the surviving corporation (R. 726). The Federal Power Commission, recognizing that the merger would yield important tax savings to El Paso, determined that the saving should "inure to the benefit of the ultimate consumers of gas of the merged corporation." *Pacific Northwest Pipeline Corp.*, 22 F.P.C. 1091, 1098. It

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We note here that Oregon is incorrect in stating (Br. 15–16) that the decree has the effect of authorizing a merger of Northwest Production Company (Pacific Northwest's producing affiliate) into the New Company. Rather the decree provides only that the shares of Northwest Production Company are to be transferred by El Paso to the New Company (R. 1842). If the New Company then wishes to effect an assets merger, it will have to apply to the Federal Power Commission for authorization, pursuant to Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a).

[37] In prepared testimony submitted to the Federal Power Commission in Docket No. G–13018 (see pp. 11–12, *supra*) Mr. Clark, chief executive officer of the New Company, stated that he had been approached by numerous banks desiring to lend working-capital funds to the New Company and that he was satisfied that such funds would be readily available.

therefore required El Paso to establish on its books of account a special reserve, in the amount of the tax-loss carryovers which it used less the amount that could have been used by Pacific Northwest if there had been no merger.

The reserve ordered by the Commission was never established. Early in 1960 El Paso told the Commission that it could not determine the extent to which an independent Pacific Northwest would have used the loss carryovers until after audit and final determination of Pacific Northwest's tax returns through 1961. Apparently the matter then lay dormant during the litigation over the validity of the Commission's merger authorization (see R. 1440).

The government objected to El Paso's initial divestiture proposal in part because it failed to take any account of the fact that El Paso had enjoyed the benefits of the tax-loss carryovers (*e.g.*, R. 1440–1441). During the course of the proceedings, the government inquired more closely into the question and found it to be exceedingly complex. Any attempt to compute the amount of tax-loss carryovers which an independent Pacific Northwest would have accrued and would have been able to use in subsequent years inevitably requires a series of guesses about the way in which the Pacific Northwest management would have exercised the options that it had—such as its use of liberalized depreciation, capitalization of interest and taxes during construction, etc.

Although the stipulated decree does not—in light of these difficulties—attempt to resolve the question of tax-loss carryovers, neither does it preclude the

Commission from enforcing its reserve requirement if the Commission concludes that it is still appropriate.[28]

IV. CASCADE WAS PROPERLY DENIED INTERVENTION OF RIGHT: ITS INTEREST IN THE PROCEEDING WAS NOT LEGALLY SUFFICIENT AND, IN ANY EVENT, CANNOT BE ADVERSELY AFFECTED BY THE DECREE ENTERED BELOW

Appellant Cascade's claim of intervention of right presents some distinct issues. We grant that California and Edison have an interest in the proceeding which—were it not adequately represented by the United States—would support a claim of intervention of right. That interest is a right of action against El Paso for violation of Section 7. Edison, as a purchaser of natural gas in the California market, and the State of California, as a representative of such purchasers, have standing to challenge a restraint upon competition in that market. We further grant that the decree entered below, if allowed to stand, would inhibit their ability to assert that interest in a later Section 7 action against El Paso relating to the same violation. Therefore, as to those appellants, we

[28] The Commission is aware that El Paso and Pacific Northwest have been merged for the past six years and that the merger has in fact yielded El Paso tax savings. Moreover, the Commission put El Paso on notice from the outset of the accounting which should be made of these savings. In view of the Commission's broad authority to control the accounting practices of natural gas companies (Natural Gas Act, § 8(a), 15 U.S.C. 717g(a)), there would appear to be no obstacle to a Commission order requiring El Paso or the New Company, or both of them, to give appropriate accounting recognition to the tax consequences which the merger actually produced. Cf. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

have argued only that the decree in this proceeding is not *res judicata* and (if the amended Rule 24(a) applies) that their interests are adequately represented by the United States.

In contrast, we do not rest on a showing that Cascade's interest was adequately represented by the United States. Under Rule 24(a) as it stood prior to its recent amendment, an applicant like Cascade asserting an interest in property subject to the court's control was not required to establish that his representation by existing parties was inadequate, but only that he might be adversely affected by the distribution of the property; and we consider the old rule applicable in this case. If the new rule were applicable, we would argue that Cascade's interest was adequately represented by the government. Superficially Cascade's interest and that of the government in this proceeding are distinct, the government's concern being with the restoration of competition to the California natural gas market and Cascade's with safeguarding its contract rights to an adequate gas supply in Washington and Oregon.[39] Actually, their interests are identical—assuring that the New Company is viable and strong. Cascade does not contend that a decree which effectively carried out this Court's mandate in the *El Paso* case would impair the New Company's ability to supply former customers of Pacific Northwest. On the contrary, it apparently assumes that strengthening the New Company as a competitor to supply the needs of the

[39] In fact, as pointed out earlier (p. 23, n. 9, *supra*), in this Court, at least, Cascade focuses almost entirely on the question of the New Company's ability to enter the California market.

California market will concomitantly enhance its ability to fulfill its commitments in the markets in which Cascade purchases. We can think of no other explanation why Cascade's objections to the decree are virtually identical to California's and Edison's.

At all events, we submit that Cascade's claim to intervention of right must fail because the interest it asserts is legally insufficient to support a claim of intervention, and, alternatively, because its ability to protect that interest cannot, as a practical matter, be impaired by the decree below.

A. A CUSTOMER'S INTEREST IN LITIGATION INVOLVING HIS SUPPLIER DOES NOT SUPPORT A CLAIM OF INTERVENTION OF RIGHT

1. Rule 24(a) as it stood prior to the 1966 amendment recognized a right of intervention where the applicant might be adversely affected by the distribution of property subject to the court's control. This provision was interpreted to require that the applicant claim a property right—title or, at the least, a legal or equitable lien—in the assets in question (see p. 26 and n. 12, *supra*). The recent amendment eliminated the requirement of establishing an interest in property subject to the court's control. It is now sufficient that the applicant claim "an interest relating to the property or transaction which is the subject of the action"—regardless of who has custody or control of the *res*. But no purpose to relax the requirements as to the nature of the "interest" that must be established appears. See Advisory Committee's Note, 39 F.R.D. 109–110. The applicant must still allege a danger of impairment to some legally recognized interest.

This principle, like that which limits the grounds on which the adequacy of a party's representation of the interest of an applicant for intervention may be challenged, rests on substantial practical considerations that have particular weight in the context of government antitrust litigation. Briefly, the problem is that any lawsuit is likely to affect the interests, in the broadest sense of that term, of many persons besides the parties. Especially in the case of a major antitrust divestiture decree that, as in this instance, involves the restructuring of companies operating throughout an entire region, a multitude of interests are bound to be incidentally affected. Dividing the assets of a large company like El Paso to create a new company—itself quite substantial—could well affect El Paso's employees, officers, competitors, investors, creditors, suppliers and customers (like Cascade); and, indeed, other present or prospective antitrust defendants for whom the decree in this case might constitute a highly significant precedent. All of these persons and firms might conceivably suffer appreciable monetary loss by virtue of the decree in this proceeding, and yet it is obvious that to entitle all so situated to intervene would make antitrust proceedings unmanageable.

On the other hand, there may be some persons—for example, bondholders of a bankrupt corporation that is being sued—who, if their interests are threatened, ought in fairness be entitled to intervene because of their "direct and immediate" stake in the "*res* which is the subject of the suit." *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 556. Somewhere in the spectrum of interests between the remote and

the immediate the line must be drawn. And in drawing the line consideration must be paid to the high importance—as stressed in the preceding part of the argument—of averting undue protraction of antitrust proceedings or dilution of the government's control of those proceedings.

The claim to intervention of right is obviously strongest where the applicant seeks to protect either a property interest or a cause of action. These are the only circumstances in which intervention of right has been allowed under Rule 24,[40] and we urge the Court to adhere to this standard. It is practical and familiar, sustained by long and unbroken authority, and especially apt in the antitrust area, where a laxer standard would have seriously untoward consequences. In that context, truly, "It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action."

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[40] Besides the cases cited in n. 9, *supra*, p. 23, see, *e.g.*, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (C.A. 7), certiorari denied, 375 U.S. 834; *Philadelphia Elec. Co.* v. *Westinghouse Elec. Corp.*, 308 F. 2d 856 (C.A. 3); *United States* v. *Third Natl. Bank of Memphis*, 36 F.R.D. 7 (M.D. Tenn.). As noted earlier (pp. 26-27, *supra*), under the old Rule 24(a), if the interest asserted is a cause of action, the right to intervene must be tested under the standards of subsection 2—whether the applicant may be bound and his representation by existing parties is inadequate—since otherwise every such applicant could come in under Rule 24(a)(3), which requires no showing of inadequate representation or *res judicata* effect, but only of an adverse effect. Any possible ambiguity here has been eliminated by the amended rule, under which inadequate representation and practical impairment must both be shown by the applicant for intervention of right whatever the interest he asserts.

United States v. *Columbia Gas & Elec. Corp.*, 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687.

We have stressed the disruptive consequences that would follow from frequent and extensive intervention in government antitrust litigation by private antitrust suitors claiming that the government's representation of their interest in effective antitrust enforcement was inadequate. Yet the adverse consequences might be even greater if intervention were broadly allowed to persons like Cascade asserting collateral interests. In the first place, the number of potential intervenors upon a theory of incidental effect is doubtless even greater than the number of those having antitrust cause of action against the defendant. Moreover, where intervention is based on an interest distinct from that asserted by the government, rarely will it be possible to demonstrate that the government's representation of that interest is adequate. Under Cascade's theory, in those cases the applicant would be entitled to intervene without even establishing to the judge's satisfaction that the government was mishandling the antitrust case. Thus, consent judgments that the court itself believed fully adequate for antitrust relief could be blocked by an applicant for intervention claiming impairment of an interest wholly unrelated, and perhaps contrary, to the goals of antitrust law. The result would be a grievous blow to effective and expeditious antitrust enforcement—and certainly that is not the intent of Rule 24(a).

2. Unless the standard is to be drastically changed,

Cascade's claim to intervention of right must fail. It has no property interest in the assets of the New Company. It is merely a customer of El Paso—as are more than 100 other firms [41]—expressing concern with the New Company's ability to supply gas to it. Any major litigation may frequently affect a party's ability to perform its contracts. To give all contractor's standing to intervene would, therefore, greatly broaden the class of those who have heretofore been considered entitled to intervene of right.

Cascade's right is not enlarged by the fact that, under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), El Paso is forbidden to terminate its service to Cascade without the authority of the Federal Power Commission. The Act does not purport to give gas purchasers any property interest—of any kind—in the assets of natural gas companies. Nor does Cascade claim that El Paso has violated its legal duty to Cascade under the Act or under any contract, thereby giving rise to a cause of action against El Paso.

Thus far, we have assumed that Cascade's claim to intervention of right is, in fact, premised on the alleged impact of the decree in this proceeding upon Cascade's customer-supplier relationship with El Paso-Pacific Northwest. We point out, however, that Cascade has apparently shifted grounds. A reading of its brief in this Court suggests that its present concern is with the effectuation of this Court's mandate to restore Pacific Northwest as a viable and effective competitor for the California market. Cascade is not

[41] Some of these customers, besides Cascade, did move for, and were denied, intervention, which they sought on substantially the same basis as Cascade (Statement, *supra*, pp. 13–14).

in that market, however, and we do not think it has standing to urge merely that the decree be strengthened with respect to markets in which it has no economic interest.

B. CASCADE'S INTEREST IN A CONTINUED ADEQUATE GAS SUPPLY CANNOT BE IMPAIRED BY THE DECREE IN THIS PROCEEDING

Even if Cascade's interest as a customer be a legally protected interest in the sense of Rule 24(a), its claim to intervention of right must fail because it has not shown that the decree in this antitrust proceeding could impair or adversely affect that interest. The Natural Gas Act, as we have seen, affords a right to natural gas purchasers, like Cascade, to adequate, uninterrupted service. However, that right is appropriately to be vindicated not in the antitrust proceeding but in proceedings before the Federal Power Commission—the agency charged with the duty to enforce the Act. The decree expressly contemplates such proceedings and would in no way prejudice their outcome (R. 2174–2175). The New Company has already filed an application with the Commission to be certificated for service and the Commission has directed a hearing on the application's merits and admitted 18 persons as intervenors, including Cascade and all other major distributors in the Pacific Northwest. Cascade will thus have a forum—the appropriate one, in view of the Commission's expert knowledge—in which to protect its interests. It will there be able to argue that the New Company's gas reserves are inadequate to service it. Should the Commission accept its contention, the decree in this proceeding would not stand as an obstacle to appropriate relief.

If the New Company's reserves are in fact inadequate, the Commission will deny the requested certificates, or issue them conditionally.[41] There can be no doubt that the Commission has full power and a recognized obligation to protect the rights of existing customers like Cascade.[42] If the Commission finds any inadequacy in the provisions of the decree in this respect, the matter will be returned to the district court and the decree appropriately modified there. In short, the decree is expressly subject to further administrative proceedings in which Cascade will participate as a party and in which its interests will be fully protected. There is accordingly no basis for intervention of right on any theory that Cascade's interests may be impaired by the present decree.

This conclusion follows *a fortiori* from *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19. In that case, Warner Brothers guaranteed a lease of theatre properties made by the applicant for intervention to a subsidiary of a Warner subsidiary. Pursuant to a decree of the court in a government antitrust case Warner was to be reorganized into two new companies, one of which would assume liabilities of the class to which the guarantee in question belonged. Since it was not shown that the new company would lack sufficient financial strength to assume the respon-

[41] *E.g*, *Kansas Pipeline & Gas Co.*, 2 F.P.C. 29, 40; *Transcontinental Gas Pipe Line Co.*, 24 F.P.C. 348; *Natural Gas Pipeline Co. of America*, 26 F.P.C. 146, 728.

[42] *Granite City Steel Co.* v. *Federal Power Commission*, 320 F. 2d 711 (C.A. D.C.); *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F. 2d 204 (C.A. D.C.); cf. *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83.

sibilities of the guarantee, the Court held that a danger of adverse effect had not been established. Here there is an affirmative showing that there can be no adverse effect by reason of the decree below. To repeat: so far as Cascade and all other existing customers of El Paso-Pacific Northwest are concerned, the decree is, in practical effect, not yet final.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS CALIFORNIA AND SOUTHERN CALIFORNIA EDISON PERMISSION TO INTERVENE UNDER RULE 24(b)

Rule 24(b) states in relevant part that "[u]pon timely application anyone may be permitted to intervene in an action * * * when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Appellants California and Southern California Edison (but not Cascade) contend that the district court abused its discretion in denying them permission to intervene under Rule 24(b). This contention is without foundation.

Permissive intervention is essentially a matter of judicial convenience and economy. See, *e.g., Wilhelm Reich Foundation* v. *United States,* 17 F.R.D. 96, 102 (D. Maine), affirmed, 221 F. 2d 957 (C.A. 1), certiorari denied, 350 U.S. 842. The district court did not abuse its discretion in denying intervention in this case.

The court was faced with numerous applications to intervene from many parties espousing diverse points of view. To admit more than a dozen third parties as intervenors, each with the right to make objections, to cross-examine witnesses, to produce its own witnesses, and to take an appeal, would inevitably have delayed the carrying out of this Court's mandate to provide prompt and effective divestiture. See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 141–142. On the other hand, denying the applicants formal intervention did not deprive them of an opportunity to present their views to the court. The stipulated decree provided not only that the public could present its views to the Department of Justice, but also that "any affected person" could present his views about the decree directly to the district court as *amicus curiae* (R. 2024–2025). A number of written statements of views were submitted and the district court also heard several persons orally. (Statement, *supra*, pp. 10–11.)

In addition, the policy considerations reviewed earlier (pp. 31–38, 61–62, *supra*) strongly counsel against liberal intervention in government antitrust cases. Those considerations are warrant enough for the trial court's exercising its broad discretion to deny permissive intervention.

Nor have appellants made clear that they have a "claim or defense" having "a question of fact or

law" in common with "the main action", as Rule 24(b) requires. It is true that appellants California and Edison could bring a private antitrust action against El Paso. But the possible existence of such a private claim is surely an insufficient ground upon which to request permissive intervention. While there are many actions in the federal courts that may easily and conveniently be combined with other claims against the same defendant, the antitrust laws reveal a definite purpose to keep the government's antitrust litigation separate from private antitrust litigation (see pp. 36–38, supra)."

"We advert finally to a point peculiar to appellant in No. 5. California asserts that as *parens patriae* for the State's natural gas users it has a greater right to intervene than Rule 24 recognizes. This is unsound. See *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (C.A. 7); cf. *New York City* v. *New York Tel. Co.*, 261 U.S. 312. *People of the State of California* v. *United States*, 180 F. 2d 596 (C.A. 9), does not provide the support for its contention that California believes. The court in that case held merely that in a suit by the United States to quiet title to certain streams in California emptying into interstate waterways—where the federal government in effect was claming the invalidity of the State constitution and laws vesting ownership of such water in the State—the State was entitled to intervene "to defend those provisions of its Constitution and Laws." 180 F. 2d at 600. (Compare 180 F. 2d at 606 (dissenting opinion).) No such challenge to State powers is even remotely involved here. Nor is this a case like *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, where intervention outside the scope of Rule 24 was allowed by virtue of an express provision for intervention contained in an earlier decree. See pp. 39–40, n. 24, *supra*.

CONCLUSION

For the reasons stated, the appeals should be dismissed.

Respectfully submitted.

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